

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\*\*\*\*\*

<b>IN THE MATTER OF CHANGE</b>	)	
<b>APPLICATION NO. 41S-30013940 BY</b>	)	<b>FINAL ORDER</b>
<b>T LAZY T RANCH INC</b>	)	

\*\*\*\*\*

The proposal for decision in this matter was entered on June 6, 2008. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

**ORDER**

Application to Change A Water Right No. 41S-30013940 by T Lazy T Ranch Inc. is  
**DENIED.**

**NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the

written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 11<sup>th</sup> day of July, 2008.

/Original signed by Jan Langel for/

John E Tubbs, Administrator  
Water Resources Division  
Department of Natural Resources and  
Conservation  
PO Box 201601  
Helena, MT 59620-1601

## **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 11<sup>th</sup> day of July 2008 by First-Class United States mail.

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/Original signed by Jamie Price/

Jamie Price, Hearings Assistant  
Hearing Unit, (406) 444-6615



30013940, signed by both Parties, was submitted August 23, 2007, and is included in the Department's record.

### **EXHIBITS**

Both the Applicant and Objectors offered exhibits for the record.

Applicant offered twenty-two exhibits for the record. All Exhibits except A-23 and A-24 were accepted and admitted into evidence. Applicant's exhibits were pre-numbered and not all exhibits originally contemplated were introduced, therefore, the numbering sequence is not consecutive:

**Applicant's Exhibit A-3** is a copy of the 1963 Judith Basin Water Resource Survey covering the vicinity of the place of use of the proposed change. (Same as Exhibit C submitted with May 4, 2007 Second Supplement to Application). A copy of this map is included as Attachment 1 of this Proposal For Decision. Features such as the historic claimed place of use, proposed place of use, existing points of diversion and proposed point of diversion have been circled, cross-hatched, or underlined for clarification. Labels for the Judith River, Ackley Lake Feeder Canal, and area identified as irrigated by the Water Resource Survey have been added by the Hearings Examiner and initialed.

**Applicant's Exhibit A-4** is a copy of an undated drawing showing the area served by the center pivot irrigation system at the proposed place of use. (Same as Exhibit A by engineer (Roger Perkins) submitted with May 4, 2007 Second Supplement to Application).

**Applicant's Exhibit A-5** is a copy of an aerial photograph dated March 20, 2007, showing the area served by the center pivot irrigation system at the proposed place of use. (Same as Exhibit D by engineer (Roger Perkins) submitted with May 4, 2007 Second Supplement to Application).

**Applicant's Exhibit A-7** is a six-page copy of the Final Settlement Stipulation for Montana Water Court Case No. 41S-76. (Same document was submitted with July 8, 2005 First Supplement to Application).

**Applicant's Exhibit A-9** is a two-page copy of an Agreement between Kelly and Jan French and the Ackley Lake Water Users' Association dated March 31, 2000. (Same document was submitted with July 8, 2005 First Supplement to Application).

**Applicant's Exhibit A-10** is a one-page copy of a cost estimate dated February 8, 2001 from Nardinger Irrigation for a center pivot and accessories addressed to Kelly and Dan French.

**Applicant's Exhibits A-12, A-13, A-14, A-15, A-16, and A-17** are one-page color photos taken by Roger Perkins showing the proposed diversion site and ditch location.

1 **Applicant's Exhibit A-19** is a two-page copy of engineering drawings by Aquoneering dated  
2 August 20, 2001, entitled French Cross Section showing the profile of the proposed ditch.

3 **Applicant's Exhibit A-21** is a two-page copy of the Judith Basin Water Resource Survey field  
4 notes for Beezelbub Ditch dated August 3, 1962. The legal description in the upper right hand  
5 corner is not legible. (Same document included in Objectors' Exhibit O-1, which clarifies that the  
6 legal description for this page is T14N R14E).

7 **Applicant's Exhibit A-22** is a two-page copy of 1963 Judith Basin Water Resource Survey field  
8 notes for T14N R13E dated August 3, 1962.

9 **Applicant's Exhibits A-23 & A-24** are undated oblique aerial photos, purported to portray  
10 diversion of water to T Lazy T property in Sections 13 & 18 taken by Kelly French, reportedly in the  
11 early 1980s . Mr. Hubble objected to Exhibits A-23 & A-24 as they were not listed in the Applicant's  
12 disclosure. The final day for discovery ended on August 10, 2007, and the Notice of First Pre-  
13 hearing Conference specified that witnesses or evidence not properly disclosed could be precluded  
14 from the hearing (*See In The Matter Of Application 41H 115487 by PC Development, Final Order*  
15 *(2003)*). Exhibits A-23 & A-24 were not properly disclosed. The Hearings Examiner sustained the  
16 objection at hearing to admittance of Exhibits A-23 & A-24 as the Objectors had no opportunity for  
17 adequate review and preparation of possible rebuttal.

18 **Applicant's Exhibit A-25** is an eight-page copy of Statement of Water Right Claim No. 41S 113212  
19 and attachments.

20 **Applicant's Exhibit A-26** is a nine-page copy of a Water Right Transfer Certificate for Water Right  
21 Claims Nos. 41S 113210, 113211, 113213, 113216, 113217, 113221, 113223, 113215, 113218,  
22 113222, 113226, 115233, 113212, and 113214 and attachments filed with DNRC November 27,  
23 1987.

24 **Applicant's Exhibit A-27** is a one-page copy of the General Abstract for Statement of Water Right  
25 Claim No. 41S 113221 printed February 4, 2006, as noted in the upper left-hand corner.

26 **Applicant's Exhibit A-28** is a four-page copy of the Affidavit of William K. French notarized on  
27 March 31, 2000.

28 **Applicants Exhibit A-29** is a five-page copy of the Final Order *In the Matter of the Application For*  
29 *Beneficial Water Use Permit 41S 105823 by Daniel French (2000)*.

30  
31 The Objectors offered nine exhibits for the record. The Hearings Examiner accepted nine  
32 exhibits:

1 **Objectors' Exhibit O-1** is a sixteen-page copy of 1963 Judith Basin Water Resource Survey maps,  
2 field notes, aerial photos for the vicinity of this change application, and DNRC Claim Examination  
3 Worksheets for Water Right Claim Nos. 41S 113212, 113214, 113215, 113218, 113222, 113210,  
4 and 115233.

5 **Objectors' Exhibit O-2** is a three-page copy of three different aerial photos of section 18 in the  
6 vicinity of this Change Application dated 1979, 1997, and 2005.

7 **Objectors' Exhibit O-3** is a five-page copy of the Criteria Assessment Review for Application to  
8 Change Water Right No. 41S 30013940 by T Lazy T Ranch, Inc. completed by James Heffner,  
9 dated September 16, 2005.

10 **Objectors' Exhibit O-4** is a nine-page copy of Statement of Water Right Claim No. 41S 113221  
11 and a General Abstract for the same Claim from the Department's water rights database printed  
12 August 28, 2007. This exhibit was not listed in the Objectors' Disclosure and was allowed at hearing  
13 over the objection of Mr. Christensen. The exhibit was allowed on the grounds that it provided an  
14 updated and accurate status (withdrawn) of the claim provided by the Applicant (Exhibit A-27). The  
15 claim was withdrawn as a condition of the Final Settlement Stipulation of Case 41-76 (Exhibit A-7).  
16 A copy of the General Abstract of the Claim in the record (Exhibit A-27) listed the Claim as "active".  
17 Exhibit O-4 clarified for the Hearing Examiner that this condition of the Stipulation had been met  
18 and claim was withdrawn.

19 **Objectors' Exhibits O-5, O-6, O-7, O-8, and O-9** are copies of Place of Use Indexes from the  
20 DNRC Water Right Query System for Douglas Stevenson, Marian Stevenson, Valerie Carr, James  
21 & Rachel Mikkelsen, and Donald and Marilyn Derks, respectively. These exhibits were not  
22 disclosed in the Objectors' Disclosure List but were allowed by the Hearings Examiner as there was  
23 no objection by the Applicant, the Exhibits were Department records, and they serve to substantiate  
24 Objectors' water rights, which are not contested.

#### 25 **PRELIMINARY MATTERS**

26 Objectors James A. and Joyce A. Turner did not appear at the hearing. The Hearing  
27 Examiner finds Objectors James A. and Joyce A. Turner in default because they did not appear at  
28 the hearing. They are no longer considered parties, and their claims or interests in this proceeding  
29 are dismissed and disregarded (Mont. Admin. Rules 36.12.208).

30 The Applicant's motion for a site visit was denied by the Hearings Examiner on the grounds  
31 that the record from the file and the hearing provide the information needed for the decision.

1 The Hearing Examiner, having reviewed the record in this matter and being fully advised in  
2 the premises, does hereby make the following:

### 3 **FINDINGS OF FACT**

#### 4 **General**

- 5 1. Application to Change Water Right No. 41S 30013940 in the name of T Lazy T Ranch, Inc.  
6 and signed by Kelly French, President, was filed with the Department on December 23,  
7 2004. Water rights to be changed were Statement of Claim Nos. 41S 113212, 41S 1113214,  
8 41S 113215, 41S 113218, and 41S 113222. (Department File)
- 9 2. The first supplement to Application 41S 30013940 was submitted by the Applicant on July 8,  
10 2005. The supplement included additional water rights to be changed: Water Right Claim  
11 Nos. 41S 113210 and 41S 115233. (Department File)
- 12 3. The Environmental Assessment (EA), dated September 16, 2005 prepared by the  
13 Department for this Application was reviewed and is included in the record of this  
14 proceeding. (Department File)
- 15 4. A preliminary Criteria Assessment Review for this Application was completed by DNRC  
16 Water Resource Specialist James Heffner on September 16, 2005. (Department File)
- 17 5. Notice of the Application was properly made in the Lewistown News-Argus on October 1,  
18 2005. (Department File)
- 19 6. A second supplement to Application 41S 30013940 was submitted by the Applicant on May  
20 4, 2007. The supplement included additional water rights to be changed: Water Right  
21 Claim Nos. 41S 113223 and 41S 113226. These claims were not listed in the Public Notice.  
22 (Department File)
- 23 7. Water Right Claims No. 41S 113223 and 41S 113226 were added to the list of water right  
24 claims to be changed in Applicant's effort to satisfy concerns of the Objectors. The addition  
25 of these claims to the application is the result of a field review and discussions conducted by  
26 the Applicant and objectors on May 31, 2006. Submittal of the second supplement to the  
27 application, which added these claims, was discussed and the submittal agreed upon in the  
28 First Prehearing Telephonic Conference held on April 20, 2007. The addition of these  
29 claims, solely owned by the Applicant, results in all of Applicant's irrigation claims  
30 appurtenant to Applicant's ownership in Sections 13 and 18 will be transferred to the new  
31 place of use. The supplement was accepted for the record by the Hearings Examiner as it  
32 served to eliminate the potential for irrigation with non-contract water on the 269 acres of



Applicant's property listed to be removed from irrigation as a result of this change application.

8. A summary of the elements for Water Right Claims to be changed is described as follows:

WR Claim #	Source	Priority Date	Flow Rate	POD <sup>(1)</sup>	Total Acres	TLT Acres To be Removed From Irr
41S 113212	Judith River	6/26/1886	5 cfs	Beezelbub Headgate	698	190
41S 113214	Judith River	7/18/1888	3 cfs	Beezelbub Headgate	698	190
41S 113215	Judith River	4/30/1883	5 cfs	Beezelbub Headgate	698	190
41S113218	Judith River	5/8/1888	5 cfs	Beezelbub Headgate	698	190
41S 113222	Judith River	7/1/1886	5 cfs	Beezelbub Headgate	698	190
41S 113210	Judith River	7/1/1882	3.75 cfs	Porter Headgate	320	230
41S 115233	Judith River	7/1/1889	5.75 cfs	Porter Headgate	320	230
41S 113223	UT Spring Branch	6/1/1896	2.5 cfs	NWSWSE Section 13 T14N R14E	611.9	232
41S 113226	Spring Creek	3/19/1937	3.79 cfs	SESWNE Section 18 T14N R14E	100	0

<sup>(1)</sup> Beezelbub headgate is located in the NWNWNW Section 28 T14N R13E.

Porter headgate is located in the NESWNE Section 13 T14N R13E

These water right claims are all supplemental as they have overlapping places of use. (Department File)

9. Water Right Claim No. 41S 113210 is for water diverted from the Judith River at a point in the NESWNE Section 13 T14N R13E, Judith Basin County (Porter Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 3.75 cfs up to 1,120.0 acre feet for 320 claimed acres of irrigation in Section 17 & 18, T14N R14E. Priority date is July 1, 1882. Applicant is the sole owner of this claim. (Department File)

10. Water Right Claim No. 41S 113212 is for water diverted from the Judith River at a point in the NWNWNW Section 28 T14N R13E, Judith Basin County (Beezlebug Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 5.0 cfs up to 1,983 acre feet for 698 claimed acres in Section 13, 24 & 25 T14N R13E and Section 18, T14N R14E. Priority date is June 26, 1886. Applicant and Daniel & Roberta French are co-owners of this claim. Applicant owns 190 acres of the 698 acre claimed place of use. (Department File)
11. Water Right Claim No. 41S 113214 is for water diverted from the Judith River at a point in the NWNWNW Section 28 T14N R13E, Judith Basin County (Beezlebug Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 3.0 cfs up to 1,189.8 acre feet for 698 claimed acres in Section 13, 24 & 25 T14N R13E and Section 18, T14N R14E. Priority date is July 18, 1888. Applicant and Daniel & Roberta French are co-owners of this claim. Applicant owns 190 acres of the 698 acre claimed place of use. (Department File)
12. Water Right Claim No. 41S 113215 is for water diverted from the Judith River at a point in the NWNWNW Section 28 T14N R13E, Judith Basin County (Beezlebug Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 5.0 cfs up to 1,983 acre feet for 698 claimed acres in Section 13, 24 & 25 T14N R13E and Section 18, T14N R14E. Priority date is April 30, 1883. Applicant and Daniel & Roberta French are co-owners of this claim. Applicant owns 190 acres of the 698 acre claimed place of use. (Department File)
13. Water Right Claim No. 41S 113218 is for water diverted from the Judith River at a point in the NWNWNW Section 28 T14N R13E, Judith Basin County (Beezlebug Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 5.0 cfs up to 1,983 acre feet for 698 claimed acres in Section 13, 24 & 25 T14N R13E and Section 18, T14N R14E. Priority date is May 8, 1888. Applicant and Daniel & Roberta French are co-owners of this claim. Applicant owns 190 acres of the 698 acre claimed place of use. (Department File)
14. Water Right Claim No. 41S 113222 is for water diverted from the Judith River at a point in the NWNWNW Section 28 T14N R13E, Judith Basin County (Beezlebug Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 5.0 cfs up to 1,983 acre feet for 698 claimed acres in Section 13, 24 & 25 T14N R13E and Section 18, T14N R14E. Priority date is July 1, 1886. Applicant and Daniel & Roberta French are co-owners of this claim. Applicant owns 190 acres of the 698 acre claimed place of use. (Department File)
15. Water Right Claim No. 41S 115233 is for water diverted from the Judith River at a point in the NESWNE Section 13 T14N R13E, Judith Basin County (Porter Ditch). Diversion occurs from April 15 to October 31 at a maximum rate of 5.75 cfs up to 1,120.0 acre feet for 320

1 claimed acres of irrigation in Section 17 & 18, T14N R14E. Priority date is July 1, 1882.

2 Applicant is sole owner of this claim. (Department File)

3 16. Water Right Claim No. 41S 113223 is for water diverted from a spring, unnamed tributary of  
4 Spring Branch, at a point in NWSWSE Section 13 T14N R14E Judith Basin County. Period  
5 of diversion is from April 15 to October 31 at a maximum rate of 2.50 cfs up to 991.5 acre  
6 feet for 611.9 claimed acres of irrigation in section 13 T14N R13E and sections 17 and 18  
7 T14N R14E, Judith Basin County. The priority date is June 1, 1896. Applicant is sole owner  
8 of this claim. (Department records)

9 17. Water Right Claim No. 41S 113226 is for water diverted from Spring Creek at a point in  
10 SESWNE Section 18 T14N R14E Judith Basin County. Period of diversion is from April 15 to  
11 October 31 at a maximum flow rate of 3.79 cfs up to 324 acre feet for 100 claimed acres of  
12 irrigation in sections 8, 17, and 18 T14N R14E. The priority date is March 19, 1937.  
13 Applicant is sole owner of this claim. (Department records)

14 18. The original application proposed to change all of the Applicant's portion (190 acres) of  
15 Water Right Claim Nos. 41S 113212, 41S 113214, 41S 113215, 41S 113218, 41S 113222  
16 up to 10 cfs (5 cfs net) and 500 acre feet per year and all with claimed point of diversion to  
17 Beezelbub Ditch, to add an additional new point of diversion downstream on the Judith River  
18 in the NW¼SW¼NW¼ of Section 18, Township 14 North, Range 14 East, Judith Basin  
19 County, Montana, and to change the place of use for the Applicant's portion of the Water  
20 Right Claims to 295.7 acres located under a center pivot in Section 17 T 14N R14E. The  
21 proposed place of use was amended with the first supplement to the application, submitted  
22 July 8, 2005, to 269 acres. Specifically, the proposed new place of use, as amended, is  
23 130.4 acres in SW¼, 12.7 acres in the SW¼ SE¼, 39.9 acres in the S½NW¼, 18.4 acres in  
24 E½SE¼NW¼, 21.6 acres in SE¼NE¼, 33.8 acres in NW¼SE¼, and 12.2 acres in  
25 NE¼NE¼SW¼ all in Section 17, Township 14 North, Range 14 East, Judith Basin County,  
26 Montana. The original application listed 269 acres to be removed from irrigation at the  
27 Applicant's current place of use of Water Right Claim Nos. 41S 113212, 41S 113214, 41S  
28 113215, 41S 113218, 41S 113222 in Section 13 T14N R13E and Section 18 T14N R14E.  
29 Crops grown on the historic place of use included pasture, alfalfa, and small grains. Crops  
30 grown under the center pivot at the proposed place of use are alfalfa and grain (barley).  
31 The existing historic point of diversion will continue to be used by other co-owners of the  
32 Water Right Claims. (Department file, Public Notice)

- 1 19. Kelly French clarified in his testimony that this Application is for a flow rate of 5 cfs  
2 measured at the proposed new point of diversion. (Testimony of Kelly French Track 4 @  
3 53:00)
- 4 20. Water Resources Surveys are exhaustive county-by-county records of actual on-the-ground  
5 water use that were authorized by the 1939 legislature. The surveys involved extensive  
6 detailed work in both the office and the field to compile a comprehensive inventory of water  
7 rights and included the use of aerial photography to assure accuracy in mapping the land  
8 areas of water use. Field forms were prepared for each landowner, showing the name of  
9 the owner and operator, photo index number, a plat defining the ownership boundary, type  
10 of irrigation system, source of water supply and the total acreage irrigated and irrigable  
11 under each. In this case, the Judith Basin Water Resource Survey (June 1963) is an  
12 accurate and reliable source for establishing what lands were historically irrigated in Judith  
13 Basin County.
- 14 21. The First Supplement to the Application submitted July 8, 2005 proposes to retire the same  
15 230 acres of irrigation from both Water Right Claim Nos. 41S 113210 and 41S 115233 in  
16 section 18 T14N R14E. Ninety acres of irrigation claimed for Section 17 T14N R14E will  
17 continue to be used in Section 17 under both claims. The diversion will be changed from  
18 Porter Ditch to the proposed new point of diversion in NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW  $\frac{1}{4}$  Section 18 T14N  
19 R14E. The flow rate and volume to be changed were not modified (increased) from the  
20 original application. Twenty-nine (29) acres of the 230 acres to be retired overlap with the  
21 historic place of use of the claims listed in the original application. Approximately 201 new  
22 acres were added under this supplement to be changed. Item 4(B)(2) in the Change  
23 Application, "Change In Place of Use" was not updated to reflect the additional acres to be  
24 removed from irrigation. The final edition of this application item, as submitted with the  
25 second supplement, is unchanged from the original application, listing 269 acres. The  
26 supplement did not provide information to support the historic use of Water Rights Claim  
27 Nos. 41S 113210 and 41S 113233 (Department file, Public Notice)
- 28 22. The diversion structure for the Porter Ditch, the claimed point of diversion and conveyance  
29 for 41S 113210 and 41S 115233, has been destroyed due to the changing course of the  
30 Judith River. The ditch was not noted at the time of the 1963 Judith Basin County Water  
31 Resources Survey and is not evident on the 1957 aerial photo, the 1979 aerial photo, or the  
32 1997 aerial photo. None of the lands claimed as irrigated by these two Water Right Claims

- 1 were shown as irrigated in the 1963 Judith Basin County Water Resources Survey and 25  
2 acres were determined to be irrigated from the 1979 aerial photograph. (Department File)
- 3 23. A second supplement to the Application submitted May 4, 2007 proposes to change the  
4 portion of Water Right Claim Nos. 41S 113223 and 41S 113226 with place of use in  
5 sections 13 and 18 as described in the original application to the proposed new place of use  
6 in Section 17. The place of use proposed for removal under Water Right Claim No. 41S-  
7 113223 is within the same place of use of the Water Right Claims to be changed in the  
8 original application. No additional acres are removed from irrigation as a result of the  
9 Second Supplement. A statement in the Second Supplement limits the portion to be  
10 removed as that portion that overlaps with the place of use to be removed as noted in the  
11 original application. No maps were submitted with the Second Supplement that show  
12 historic POU of these two Water Right Claims. Based on review of the claim information for  
13 41S 113223 it appears that up to 60 acres in section 13 and up to 172 acres in section 18  
14 overlap with the area described in the original application as that area to be removed from  
15 irrigation. For Water Right Claim 41S 113226 it appears that zero (0) acres of the place of  
16 use of this claim overlap with the area described in the original application as that area to be  
17 removed from irrigation. The claimed place of use for 41S 113226 is 20 acres in E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$   
18 Section 18 T14N R14E, 40 acres in N $\frac{1}{2}$ N $\frac{1}{2}$  Section 17 T14N R14E, and 40 acres in S $\frac{1}{2}$ S $\frac{1}{2}$   
19 Section 8 T14N R14E. The diversion would be changed to the proposed new point of  
20 diversion in NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  Section 18 T14N R14E. The flow rate and volume to be  
21 changed were not modified from the original application. The supplement did not provide  
22 information to support the historic use of Water Right Claim Nos. 41S 113223 and 41S  
23 113226, added to the Application in the Second Supplement. (Department File)
- 24 24. The Application originally included an increase in acres to be irrigated based on the  
25 Applicant's use of water salvaged due to proposed reduced ditch loss. That portion of the  
26 application was withdrawn in the Second Supplement to the application submitted on May 4,  
27 2007. (Department File)
- 28 25. The Second Supplement to the Application, Exhibit B, includes a list of Statements of Claim  
29 to be changed. The list includes co-owners for each right. This exhibit lists co-owners for  
30 41S-113210, 115233, & 113223. Department records list T Lazy T as the sole owner of  
31 these claims. (Department File)
- 32 26. The Beezelbub Ditch will continue to serve as the point of diversion for the portion of Water  
33 Right Claims 41S 113212, 113214, 113215, 113218, and 113222 owned by Daniel and

1 Roberta French. The Beezelbub Ditch will continue to serve as the point of diversion for  
2 Water Right Claims 41S 104316, 104319, 104320, 104321, 104322, 104323,  
3 104324, 104325 and 104326, which are owned by James McCollum.

4 27. The Agreement and Stipulation Regarding Change Application No. 41S 30013940, dated  
5 August 1, 2007, entered into and signed by Applicant and Objectors BLM and DFWP  
6 (Stipulation) resulted in these two parties withdrawing their objections. The Stipulation  
7 further modifies the Application. Exhibits A-4 and A-5 depict the area under the center pivot  
8 that would constitute the place of use under the scenarios outlined below. The Department  
9 may consider a private agreement but is not bound to accept a private agreement in its  
10 decision.

11 a. The upper limit of area that can be irrigated under this Change Authorization is 269  
12 acres (See Item #2 of Stipulation). This is consistent with the second supplement  
13 (May 2007) to the application.

14 b. The place of use is further limited to 183 acres, based on the area irrigated at the  
15 time of the 1963 Judith Basin Water Resources Survey, pending either of two  
16 conditions noted below (See Item #3 of Stipulation).

17 i. If a USGS Gauging Station is installed on the Judith River in Section 27 T15N  
18 R15E the additional 86 acres (269 acre maximum – 183 acres shown in  
19 Water Resources Survey) identified in item #4 of the Stipulation may be  
20 irrigated at any time the new USGS Station reads at or above 25 cfs. (See  
21 Item #8 of Stipulation)

22 ii. If upon entry of a final Water Court Decree relating to the Judith River  
23 Drainage, additional verified acres or some portion are adjudicated as being  
24 acres irrigated with priority dates prior to July 1, 1973, the Applicant will be  
25 allowed to so utilize the earlier priority dates and irrigate acreages of the  
26 claims included in this application finally determined pursuant to the  
27 adjudication process.

#### 28 **Historic Use & Adverse Effect**

29 28. Applicant proposes to remove 269 acres from irrigation in Section 13 T14N R13E and  
30 Section 18 T14N R14E. (Department File – Second Supplement to Application)

31 29. Applicant listed in its original Statement of Claim 190 acres for its share of Water Right  
32 Claim Nos. 41S 113212, 41S 1113214, 41S 113215, 41S 113218, and 41S 113222.

(Department File & Records)

30. The 1963 Judith Basin Water Resources Survey indicates 183 acres irrigated in the area within the larger 269 acres proposed to be changed. (Department File)

31. William K. French acquired property in Section 13 T14N R13E and Section 18 T14N R14E from the estate of former owner E.H. Bodley in approximately 1966. (Exhibit A-28)

32. Judith Basin Water Resource Survey Field Notes completed August 3, 1962 by the State Engineers Office for property owned by E.H. & Bertha Bodley in T14N R14E indicate 119 acres irrigated with Judith River water delivered by Beezelbub Ditch. The "In Use" column states 'part' for "Water Delivered by Beezelbub Ditch". The remarks section includes the following statement: "*Carries water (private) three to Ackley Lake Feeder Canal for right of way*". "three" appears to be a typographical error. (Exhibit O-1 and Exhibit A-21)

33. Water Resource Survey Field Notes completed August 3, 1962 by the State Engineers Office for property owned by E.H. & Bertha Bodley in T14N R13E indicate 41 acres irrigated with Judith River water delivered by Beezelbub Ditch. The intent of the notation "*(not now)*" inserted beneath "*Beezelbub Ditch*" in the Name of Ditch column is not known. (Exhibit O-1 and Exhibit A-22)

34. The 1957 aerial photo supplied by the Applicant identifies 198.6 acres as irrigated of which 185.7 acres correspond to the area claimed in the amended Application as the area to removed from irrigation. (Department File, Application Sheet 5 of 7)

35. The 1965 aerial photo supplied by the Applicant identifies 173.3 acres as irrigated, of which 150.9 acres correspond to the area claimed in the amended Application as the area to removed from irrigation (see 2<sup>nd</sup> Supplement, Application Item #4(B)(2). (Department File, Application Sheet 6 of 7)

36. The claim examination conducted by DNRC using 1979 aerial photos indicated that 269 acres were irrigated in the area claimed as Applicants' share of Water Right Claim Nos. 41S 113212, 41S 1113214, 41S 113215, 41S 113218, and 41S 113222. The claims examination did not differentiate between area irrigated with private water rights and area irrigated with contract water from the Ackley Lake Project. (Department File & Records and Exhibit O-1)

37. I find that 185.7 acres were historically irrigated within the place of use proposed to be changed by the amended Application.

38. Statement of Claim 41S 113212 with the notarized signature of W.K. French dated February 5, 1982 contains the following written statement: "*Explanatory Note – Water From the Beezelbub ditch is diverted down Spring Creek and Antelope Creek when the ditch*

1 *intersects the creeks. This water is then transported from the creeks through the Ackley*  
2 *Lake Feeder Canal, and diverted from said canal for irrigation on lands in Sec. 13 TN. 14*  
3 *North, Range 13 East; lands in Sec. 18 TN. 14 North Range 14 East; and lands in Sec. 17*  
4 *14 North, Range 14 East.” Italics added. (Exhibit A-25)*

5 39. On February 5, 1982 William K. and Marceline L. French filed Statement of Claim 41S  
6 113221 for irrigation of 647.5 acres with Judith River water diverted at the Ackley Lake  
7 Feeder Canal point of diversion. This claim is listed as supplemental to all claims included in  
8 this change application, as they have overlapping places of use. This claim contains the  
9 following statement: “*At the completion of Ackley Lake Canal, point of diversion was*  
10 *changed from SW¼SW¼SW¼ Sec. 21, T14N R13E to the point of diversion of the Ackley*  
11 *Lake Feeder Canal, being SW¼SW¼NW¼ Sec. 13 T14N R13E. This change is dated*  
12 *April, 1938, water being diverted from Judith River, through Ackley Lake Feeder Canal*  
13 *headgate, thence transported through Ackley Lake Feeder Canal, and diverted from said*  
14 *canal for irrigation on lands in Sec13, T14N R13E; lands in Sec 18 T14N R14E, and lands in*  
15 *Sec 17, T14N, R14E.” Italics added. Mr. French may have been referring to the Beezelbub*  
16 *Ditch when he changed the POD in 1938, but it is not certain. The Ackley Lake Water Users*  
17 *Association and the Montana Department of Natural Resources and Conservation filed*  
18 *objections to the claim. These objections were the basis for Montana Water Court Case*  
19 *No. 41S-76. (Exhibit A-7, A-27 & O-4)*

20 40. On July 25, 1986, William and Marceline French, predecessors in interest to Lazy T Ranch,  
21 Inc. signed the Final Settlement Stipulation in Montana Water Court Case 41S-76. As a  
22 result of the settlement, Water Right Claim No. 41S 113221 was withdrawn, as were the  
23 objections, and French was entitled to purchase a total of 300 acre feet of water from the  
24 State-owned Ackley Lake Project to be withdrawn from the Ackley Lake Feeder Canal (an  
25 additional 100 acre feet over and above the 200 acre feet already contracted to French).  
26 The Settlement, at Item #5 recognizes that French has “*existing water rights on Antelope*  
27 *Creek, Spring Creek, and water rights which flow through the Beezelbub Ditch, and*  
28 *historically, the [Ackley Lake Water Users’] Association has allowed French to flow those*  
29 *waters through the Ackley Lake Feeder Canal with existing headgates and outlets on both*  
30 *sides of the canal.” The Stipulation goes on to state that “in return for the right to purchase*  
31 *300 acre feet of water and further being allowed to remove the water from the feeder canal,*  
32 *French agrees that any water flowing into the canal from Antelope Creek, Spring Branch,*  
33 *and the Beezelbub Ditch belongs to the Department [of Natural Resources and*



1       *Conservation]* and French shall have no claim on the same.” The Stipulation allows for  
2       construction of siphons under the feeder canal for the purpose of passing through waters  
3       from the above drainages. (Exhibit A-7)

4       41. The siphon(s) under the Ackley Lake Feeder Canal at Spring Branch and Antelope Creek  
5       allowed in the Final Settlement Stipulation for Water Court Case 41S-76 were not built.  
6       (Testimony of Kelly French & Department File – First Application Supplement - page 2 of  
7       narrative)

8       42. A Water Right Transfer Certificate was filed with DNRC on November 27, 1987, that  
9       includes all the water rights included in this change Application, including Application  
10      Supplements #1 and #2. The Buyer’s listed are Kelly and Jan French. The Certificate is  
11      signed by the Sellers, W.K. and Marceline French. An Addendum signed by the parties on  
12      December 30, 1987 and returned to the DNRC April 1, 1988 indicates that Buyer’s portion of  
13      claim 41S 113212 is 190 acres in Sections 13 & 18. (Exhibit A-26)

14      43. On March 31, 2000 Kelly and Jan French, successors to William K. French and Marceline  
15      French, entered into an agreement with the Ackley Lake Water Users Association. Item # 3  
16      allows for *“in lieu of placing siphons tubes under or through the Ackley Lake Feeder Canal,*  
17      *water from these sources [Antelope Creek, Spring Branch, and Beezelbub Ditch] entering*  
18      *the Frenches’ property will be measured before it mingles with the feeder canal and the*  
19      *Frenches will be entitled to allow an equivalent amount of water out of the canal through the*  
20      *headgates on the north side. The water the Frenches are allowed to pass through is subject*  
21      *to volume and flow restrictions set forth in the abstracts for the various water rights”.* Italics  
22      added. Item #4 of this agreement goes on to state that responsibility for measuring the  
23      inflows and outflows will be the shared by the Association and the Frenches. The  
24      Department is not a party to this agreement, even though the Final Settlement Stipulation in  
25      Case 41S-76 assigns the water entering the canal from these sources as belonging to the  
26      Department if the siphons are not built. (Exhibit A-9)

27      44. An affidavit signed by William K. French on an unspecified date in March 2000 and  
28      notarized on March 31, 2000, states: he acquired the lands in question in Section 13 & 18  
29      from the estate of E. H. Bodley in approximately 1966 (item # 6 of affidavit); based on the  
30      understanding that he should claim (in the water right claim filing process) not only lands  
31      that were historically irrigated, but also lands that he might wish to irrigate in the future, he  
32      claimed the irrigation of lands he acquired from the Bodley estate in 1966 in Sections 13 &  
33      18 as part of his irrigation from the Judith River via the Beezelebug Ditch: he *“never actually*

1        *irrigated in either Sections 13 or 18 using water from the Judith River conveyed via the*  
2        *Beezelbub Ditch. Instead, I purchased contract water through the Ackley Lake Canal to*  
3        *irrigate my lands north of the canal in Sections 13 and 18'* (item # 7 of affidavit); he used  
4        only contract water to irrigate his lands in Sections 13 and 18 north of the canal and had  
5        more contract water available than needed to irrigate his lands in Section 13 and 18 (items #  
6        11 & 15 of affidavit). (Exhibit A-28) This statement contradicts earlier statements by William  
7        French and is in conflict with testimony regarding his purchase of Ackley Lake contract  
8        water. (See FOF #\_37 & 44)

9        45. William K. French's first contract for water from the Ackley Lake Water Users Association  
10        was in 1982 for 100 acre feet; an additional 100 acre feet were contracted starting in 1984;  
11        and another 100 acre feet were contracted in 1986 as a result of settlement of Montana  
12        Water Court case 41S-76. (Testimony of Kelly French Track 4 @ 1:12)

13        46. Water can be transferred through the Ackley Lake Feeder Canal at four locations on the  
14        property formerly owned by Bodley and acquired by W. K. French in section 13 T14N R13E  
15        and section 18 T14N R14E that have been in place since the Ackley Lake Feeder Canal  
16        was built in 1937: from west to east – a flume over the canal at the Bodley Ditch; a siphon  
17        tube under the canal at a spring that originates behind the Kelly French residence in section  
18        13; through the canal at Spring Branch with an open ditch on the south and a headgate on  
19        the north; and through the canal at Antelope Creek with an open ditch on the south side and  
20        a headgate on the north. (Testimony of Kelly French Track 4 @ 12:30 – 16:30)

21        47. Water from the Beezelbub Ditch flowing through the Ackley Lake Feeder Canal at Spring  
22        Branch is measured by Kelly French and he keeps records of these measurements.  
23        (Testimony of Kelly French Track 4 @ 15:00±)

24        48. Neither the application nor testimony includes a record of water measurements of water  
25        flowing through the Ackley Lake Feeder Canal at Spring Branch. (Department File)

26        49. Kelly French testified that he recalled the Bodley place in Sections 13 & 18 being irrigated  
27        with water from the Beezelbub Ditch that was passed through the Ackley Lake Canal at  
28        Spring Branch and Antelope Creek while he was in high school and prior to W.K. French  
29        acquiring the property in 1966. (Testimony of Kelly French at Track 4 @ 3:50 ±)

30        50. During the summer of 2007 there was 5 cfs of irrigation water available in Spring Branch  
31        Creek. It is not clear from the testimony if this was contract water or water from private water  
32        rights. (Testimony of Kelly French Track 6 @ 0:35)

33        51. Kelly French testified that after W.K. French acquired the Bodley property in Sections 13 &

1 18 in 1966 at least as many acres noted in the 1963 Judith Basin Water Resources Survey  
2 were irrigated with water from the Beezelbub Ditch through Spring Branch and Antelope  
3 Creek. This testimony contradicts the affidavit of W.K. French executed in 2000 that only  
4 contract water was ever applied to those lands. (Testimony of Kelly French at Track 4 @  
5 28:50±)

6 52. Water use by the other appropriators with rights on Beezelbub Ditch, Daniel French and  
7 James McCollum, including reservoirs constructed by Daniel French as allowed under  
8 Beneficial Water Use Permit 41S 105823, restrict the ability of Applicant to deliver  
9 Beezelbub Ditch water down Spring Branch to his historic place of use in Sections 13 and  
10 18. (Testimony of Kelly French Track 6 @ 7:00)

11 53. The capacity of the Beezelbub Ditch is 25-30 cubic feet per second as limited by a culvert  
12 downstream of the headgate. (Testimony of Roger Perkins)

13 54. There is no measurement device at the Beezelbub diversion and no record of amount of  
14 water historically diverted. (Testimony of Roger Perkins and Roger Derks)

15 55. Kelly French has constructed dams on Spring Creek to store Ackley Lake contract water. He  
16 does not store water from his private water rights in these reservoirs and the reservoirs are  
17 not part of this Application. (Testimony of Kelly French Track 6 @ 8:30)

18 56. Andrew Brummond testified that the source for irrigation water for Kelly French property in  
19 Sections 13 & 18 has been from Ackley Lake Canal, based on personal observation,  
20 discussions with Roger Ebcus, and being present to hear testimony of W.K. French in  
21 contested case hearing before the Department in *In the Matter of Beneficial Water Use*  
22 *Permit Application No. 41S 105823 by Daniel French (2000)* for a ground water permit  
23 application on Spring Branch). (Testimony of Andrew Brummond Track 9 @ 12:30)

24 57. James McCollum, age 70 and who has lived on a neighboring ranch all his life, testified that  
25 E.H. Bodley's source of water to irrigate his property in Sections 13 & 18 was water pumped  
26 out of the Ackley Lake Canal to a hand-set sprinkler system. The testimony was not specific  
27 as to the timing or amount of the diversion. (Testimony of James McCollum Track 11 @  
28 8:00) Mr. McCollum also testified that the only time he has seen enough water to serve  
29 irrigation purpose is in direct response to snowmelt or a hard rain. Generally there is only  
30 enough water in Spring Branch at the Kelly and Jan French property to provide stockwater  
31 (Testimony of James McCollum Track 12 @ 2:50)

32 58. Roger Ebcus, ditch rider for the Ackley Lake Water Users Association since 1987, delivers  
33 contract water to T Lazy T Ranch via headgates at Spring Branch and Antelope Creek.

1 When there is water entering the canal at Spring Branch or Antelope Creek he “eyeballs” the  
2 amount and gives T Lazy T credit for that amount. He does not measure the inflow. He has  
3 “never seen a whole lot” of water in Spring Branch. (Testimony of Roger Ebcus)

4 59. Myron Campbell, current age 73, has lived in the area his whole life, was raised as a  
5 neighbor of E.H. Bodely, worked with Bodley, lived on the Bodley place for about 5 years,  
6 and inherited a portion of the Bodley property. Campbell testified that although Bodley had  
7 no Ackley Lake shares he was given the right to use water from the Ackley Lake Feeder  
8 Canal for irrigating property in sections 13 & 18 and he did so utilizing a pump and a wheel  
9 line. He never saw water going to Bodley ownership out of Beezelbub Ditch. He admitted  
10 that Spring Branch and Antelope Creek probably put a little extra water in the (Ackely Lake  
11 Feeder) canal. Under cross-examination Mr. Campbell admitted that he was uncertain if  
12 Bodley irrigated out of the Beezelbub Ditch. (Testimony of Myron Campbell)

13 60. The Applicant based the historic flow rate and volume of the water right claims included in  
14 the original application on ditch capacity and crop consumptive use requirements. The  
15 Applicant used the NRCS Blaney Criddle method to estimate consumptive use of grass,  
16 alfalfa, and grains. The Applicant concluded that a typical 3 ton hay yield would result in  
17 depletion of about one acre foot per acre from the drainage. This assumes that water was  
18 historically available at all times, with timing and quantity necessary to maximize crop  
19 production. The Applicant did not provide an accounting of all water rights included in the  
20 application explaining how much water was used from each source. Applicant did not  
21 present evidence of the historic (pre-1973) diverted flow for each right, the historic pattern of  
22 use, or the historic consumed amount of each right proposed for change. No information  
23 was presented as to how these water rights were operated to accomplish supplemental  
24 irrigation. The Application did not provide a comparison between past use of each water  
25 right and in comparison to the proposed use. The Applicant states that the center pivot at  
26 the new place of use requires 6 gpm per acre or about 3.75 cfs for 289 acres. Applicant  
27 presented limited general analysis regarding return flows for the current place of use and no  
28 analysis of return flow of the proposed place of use (FOF 65). The First Supplement to the  
29 application, submitted on July 8, 2005, added two water right claims to the water rights to be  
30 changed (41S 113210 and 41S 115233). The historic consumptive use of these water rights  
31 was not documented in the supplement. The Applicant specified the claimed flow rate for  
32 each of the claims (3.75 cfs and 5.75 cfs) and went on to state that the Applicant is not  
33 increasing the amount of water to be changed from the original Application. The second

1 supplement to the application submitted on May 4, 2007 added two additional water right  
2 claims to the water rights to be changed (41S 113223 and 41S 113226). The historic  
3 consumptive use of these water rights was not documented in the supplement. (Department  
4 File & testimony of James Heffner)

5 61. There is conflicting evidence in the record regarding historic use of the water rights  
6 proposed to be changed. (Department file, testimony of Kelly French)

7 62. Objectors Stevenson, Carr, Mikkelsen, and Derks have multiple water right claims listed in  
8 the Exhibits listed below from the Judith River with points of diversion downstream from the  
9 Beezelbub Ditch and downstream from the proposed new point of diversion. Some of these  
10 water right claims are senior to the T Lazy T water right claims that are the subject of this  
11 application. (Exhibits O-5, O-6, O-7, O-8, & O-9 and testimony of Douglas Stevenson, Rod  
12 Mikkelsen, and Roger Derks)

13 63. Objectors contend that Applicant does not irrigate the area to be taken out of production with  
14 water from Beezelbub ditch, and has given up his Judith River water diverted at the Ackley  
15 Lake Feeder Canal in exchange for contract water, therefore to change this POU of these  
16 rights to the center pivot would result in an expansion of the historic use. (Testimony of Andy  
17 Brummond, Roger Derks, and Douglas Stevenson)

18 64. Douglas Stevenson & Roger Derks testified that change in point of diversion (POD) will be  
19 an adverse effect because there is no way to determine if 5 cfs less water will be diverted  
20 down the Beezelbub Ditch to account for the 5 cfs that T Lazy T will divert at the proposed  
21 new POD. Water diverted down Beezelbub Ditch is either used south of the Ackley Lake  
22 Feeder Canal (and not available to downstream PODs on Judith), flows directly into the  
23 canal and flows to Ackley Lake (and not available to downstream PODs on Judith), or  
24 passed through the canal and used for irrigation north of the canal (in this case portion not  
25 consumed may return to the Judith). (Testimony of Rod Mikkelsen and Roger Derks)

26 65. In an effort to quantify return flow patterns streamflow measurements were taken two times  
27 in a single year, one at high flow and one a low flow. These measurements indicate that the  
28 Judith River between the Beezelbub headgate and the proposed new point of diversion is a  
29 losing reach of stream. No pre-1973 historical records of streamflow or analysis of historical  
30 records of streamflow were presented (Testimony of Roger Perkins)

### 31 **Adequacy of Diversion Works**

32 66. The proposed diversion dam, headgate, and conveyance ditch were designed by a

1 registered professional engineer with many years of experience based on local survey  
2 information collected for this specific purpose using standard accepted technology. Detailed  
3 drawings were provided in the change application and as exhibits at the hearing. (Testimony  
4 of Roger Perkins, Department File, Exhibit A-12 through A-17 and A-19)

#### 5 **Beneficial Use**

6 67. Applicant will use the water at the proposed place of use for irrigation of alfalfa and grain in  
7 an existing field under an existing center pivot that has been in use since 2001. Irrigation is  
8 a recognized beneficial use of water. (Department File, Testimony of Roger Perkins & Kelly  
9 French)

10 68. The Applicant is requesting 5 cfs up to 500 acre feet for irrigation of up to 269 acres or  
11 1.86acre feet/acre. Under the Agreement and Stipulation agreed to by DFWP and BLM,  
12 Applicant proposes that pending installation of a new USGS gaging station and flow rate  
13 limitations or a final Water Court decree, the acreage will be limited to 183 acres. The  
14 Applicant did not modify the volume of water requested from the original application. At  
15 times under the proposed Stipulation only 183 acres can be irrigated. 500 acre feet for 183  
16 acres is 2.7 acre feet/ acre. This exceeds the DNRC standards for sprinkler irrigation in  
17 Climatic Area IV of 1.76 to 2.07 acre feet per acre (assumes 70% efficiency)(36.12.115  
18 ARM). When the area irrigated is limited to 185 acres there is no plan or assurance by  
19 Applicant that the water proposed to be diverted is the amount necessary to accomplish the  
20 proposed use without waste. (Department File)

#### 21 **Possessory Interest**

22 69. Applicant has proven he has a possessory interest, or the written consent of the person with  
23 the possessory interest, in the property where the water is to be put to beneficial use.  
24 (Department file)

#### 25 **Salvage Water**

26 70. The applicant withdrew his original proposal to utilize salvage water in the first supplement  
27 to the application. In its final form, the application does not involve salvaged water.  
28 (Department File)

1 **Water Quality Issues**

2 71. The application received a valid water quality objection under Mont. Code Ann. §85-2-  
3 402(2)(f). There were not any objections filed relative to the ability of a discharge permit  
4 holder to satisfy effluent limitations of his permit under Mont. Code Ann. §85-2-402(2)(g).

5 72. The water quality objection contends that moving the point of diversion downstream to the  
6 new location will put it close to and just upstream from the Objectors' point of diversion,  
7 resulting in lower river flow at his diversion. This decrease in volume will allegedly result in  
8 increased silt content of the water and warmer water temperatures. This will allegedly cause  
9 problems for pumps and other equipment. (Department File)

10 73. Silt concentration in the Judith River is not an issue during low summer flow rates because  
11 the river does not carry a substantial silt load at low flow. The proposed change in point of  
12 diversion of 5 cfs will not cause a substantial impact in flow rate during high flows when the  
13 river has the capability to transport high concentration of silt. (Testimony of Roger Perkins)

14 74. Moving the point of diversion downstream from the Beezelbub Ditch to the proposed new  
15 point of diversion will leave the 5 cfs in the Judith River for a longer distance and closer to  
16 the Objectors' headgate, reducing the impact on water temperature by keeping more water  
17 in the River between the Beezelbub headgate and the proposed new point of diversion.  
18 (Testimony of Roger Perkins)

19  
20 Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing  
21 Examiner makes the following:

22 **CONCLUSIONS OF LAW**

- 23 1. The Department has jurisdiction to approve a change in appropriation right if the  
24 appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
- 25 2. The Department shall approve a change in appropriation right if the appropriator proves by a  
26 preponderance of evidence the proposed change in appropriation right will not adversely  
27 affect the use of the existing water rights of other persons or other perfected or planned  
28 uses or developments for which a permit or certificate has been issued or for which a state  
29 water reservation has been issued; except for a lease authorization pursuant to Mont. Code  
30 Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery  
31 resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code  
32 Ann. § 85-2-439 when authorization does not require appropriation works, the proposed

means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984)(judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).
4. In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W.Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.



1 (13) A change in appropriation right contrary to the provisions of this section is invalid. An  
2 officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any  
3 manner an unauthorized change in appropriation right. A person or corporation may not, directly  
4 or indirectly, personally or through an agent, officer, or employee, attempt to change an  
5 appropriation right except in accordance with this section.

6 (italics added).

7 Montana's change statute simply codifies western water law.<sup>1</sup> One commentator  
8 describes the general requirements in change proceedings as follows:

9 Perhaps the most common issue in a reallocation [change] dispute is whether other  
10 appropriators will be injured because of an increase in the consumptive use of water.

11 Consumptive use has been defined as "diversions less returns, the difference being the amount  
12 of water physically removed (depleted) from the stream through evapotranspiration by irrigated  
13 crops or consumed by industrial processes, manufacturing, power generation or municipal use."

14 "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied  
15 in addition to the natural precipitation which is effectively available to the plant."

16 An appropriator may not increase, through reallocation [change] or otherwise, the  
17 actual historic consumptive use of water to the injury of other appropriators. In general, any  
18 act that increases the quantity of water taken from and not returned to the source of supply  
19 constitutes an increase in historic consumptive use. As a limitation on the right of  
20 reallocation, historic consumptive use is an application of the principle that appropriators  
21 have a vested right to the continuation of stream conditions as they existed at the time of  
22 their initial appropriation.

23 Historic consumptive use varies greatly with the circumstances of use.

24 Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991  
25 edition) (italics added).

26 In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy  
27 District, 717 P.2d 955 (Colo. 1986), the court held:

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<sup>1</sup> Although Montana has not codified the law in the detail Wyoming has, the two states requirements are  
virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting  
permission to make such a change .... The change ... may be allowed provided that the quantity of  
water transferred ... shall not exceed the amount of water historically diverted under the existing use,  
nor increase the historic rate of diversion under the existing use, nor increase the historic amount  
consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any  
manner injure other existing lawful appropriators.

1 [O]nce an appropriator exercises his or her privilege to change a water right ... the  
2 appropriator runs a real risk of *requantification of the water right based on actual historical*  
3 *consumptive use*. In such a change proceeding a junior water right ... which had been strictly  
4 administered throughout its existence would, in all probability, be reduced to a lesser quantity  
5 because of the relatively limited actual historic use of the right.  
6 (italics added)

7 See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western  
8 States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or  
9 countenance any increase in the quantity of water diverted under the original exercise of  
10 the right; in no event would an increase in the appropriated water supply be authorized  
11 by virtue of a change in point of diversion, place of use, or purpose of use of water); A.  
12 Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)(“A water  
13 holder can only transfer the amount that he has historically put to beneficial use.... A  
14 water holder may only transfer the amount of water consumed. The increment diverted  
15 but not consumed must be left in the stream to protect junior appropriators.  
16 Consumption is a function of the evapotranspiration of the appropriator’s crops.  
17 Carriage losses are usually added to the amount consumed by the crops.”); Colo. Rev.  
18 Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to  
19 consider abandonment of the water right).

20 The requirements of Montana’s change statute have been litigated and upheld in In  
21 re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425,  
22 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of proof at  
23 all stages before the Department and courts, and the applicant failed to meet the burden  
24 of proving that the change would not adversely affect objectors' rights; the application  
25 was properly denied because the evidence in the record did not sustain a conclusion of  
26 no adverse effect and because it could not be concluded from the record that the means  
27 of diversion and operation were adequate).

28 Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont.  
29 Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person  
30 claiming the change adversely affected their water right, although the law was the same  
31 in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co.,  
32 Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing  
33 denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont.

1 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963  
2 (1974)(plaintiff could not change his diversion to a point upstream of the defendants  
3 because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72,  
4 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion  
5 downstream, so long as he installed measuring devices to ensure that he took no more  
6 than would have been available at his original point of diversion); Head v. Hale, 38 Mont.  
7 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer  
8 mining purposes cannot so change its use as to deprive lower appropriators of their  
9 rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18  
10 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining  
11 purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for  
12 irrigation purposes; the defendant then changed the place of use of his water right,  
13 resulting in the water no longer being returned to the gulch - such change in use was  
14 unlawful because it absolutely deprived the plaintiff of his subsequent right).

15 The DNRC in administrative rulings has held that a water right in a change  
16 proceeding is defined by actual beneficial use, not the amount claimed or even decreed.  
17 In the Matter of Application for Change Authorization No. G(W)028708-411 by  
18 Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application  
19 for Change Authorization No.G(W)008323-q76L by Starkel/Koester, April 1, 1992, Final  
20 Order.

21 A key element of an evaluation of adverse effect to other appropriators is the  
22 determination of historic consumptive use of water. Consumptive use of water may not  
23 increase when an existing water right is changed. (In the Matter of Application to  
24 Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor,  
25 Final Order (2005); In The Matter of Application to Change a Water Right No. 40A  
26 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order  
27 adopted findings of fact and conclusions of law in proposal for decision); In the Matter of  
28 Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC,  
29 Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of  
30 law in proposal for decision).

31 In a change proceeding, the *consumptive* use of the historical right has to be  
32 determined:

1 In a reallocation proceeding, both the actual historic consumptive use and the expected  
2 consumptive use resulting from the reallocation [change] are estimated. Engineers usually make  
3 these estimates.

4 With respect to a reallocation, the engineer conducts an investigation to determine the  
5 historic diversions and the historic consumptive use of the water subject to reallocation [change].  
6 This investigation involves an examination of historic use over a period that may range from 10  
7 years to several decades, depending on the value of the water right being reallocated [changed].

8 ....

9 When reallocating [changing] an irrigation water right, the quantity and timing of historic  
10 consumptive use must be determined in light of the crops that were irrigated, the relative priority  
11 of the right, and the amount of natural rainfall available to and consumed by the growing crop.

12 ....

13 Expected consumptive use after a reallocation [change] may not exceed historic *consumptive*  
14 use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an  
15 increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is  
16 decreased so that actual historic consumptive use is not increased.

17 2 Water and Water Rights at § 14.04(c)(1).

18 The applicant in a change proceeding in Montana must prove the historic beneficial  
19 use of the water to be changed, no matter how recently the water right was decreed in  
20 Montana's adjudication. Although since Montana started its general statewide adjudication  
21 there is no Montana Supreme Court case on point to support the conclusion that even water  
22 rights as decreed in final decrees will be limited in change proceedings to their historical  
23 use, that conclusion is supported by the case of McDonald v. State, 220 Mont. 519, 722  
24 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in  
25 accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only  
26 for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does  
27 not constitute *prima facie* evidence of historical use

- 28 5. In the case currently before this Hearing Examiner, Applicant and Applicant's witnesses  
29 provided very limited factual evidence to quantify the amount of water historically used: flow  
30 rate, volume, period of use and consumption. There is evidence of historical irrigation in the  
31 form of the 1963 Judith Basin County Water Resources Survey (Exhibits A-3, 21, 22); and  
32 Exhibit A-25 claiming use of water on the property in question diverted at Beezelbub Ditch.  
33 The record also contains copies of the Statements of Claim, a final settlement stipulation,  
34 current crop consumption estimates, and contradicting evidence regarding the source of the

1 water used for irrigation. The amount of water historically consumed by the rights contained  
2 in the original application was based on ditch capacity and current crop consumptive  
3 requirements. The results obtained from the methodology employed were based on the  
4 assumption that water was available in the quantity and timing to maximize crop production.  
5 These assumptions were not supported by factual information contained in the Application.  
6 The historic diversion and consumptive use of the water added with the first and second  
7 supplements was not addressed and no evidence regarding historical use of Water Right  
8 Claims is included in the supplements. Likewise the supplements did not address how  
9 these rights were to fit into the overall analysis of this Application. Montana has no legal  
10 standard in a water right change proceeding for assigning a volume for historic use. The  
11 actual historic use of water could be less than the optimum utilization represented by the  
12 duty of water in any particular case. Application for Water Rights in Rio Grande County  
13 (2002) \_\_Colo. \_\_, 53 P.3d 1165. It is the applicant's burden to produce this evidence of  
14 historical use, and not doing so constitutes a failure of proof. *In the Matter of Application to*  
15 *Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision,  
16 adopted by DNRC Final Order (2005). Only 183 acres of the 269 proposed to be changed  
17 were shown to be historically irrigated. Applicant failed to prove that the water irrigating  
18 these acres was as claimed and not Ackley Lake Project contract water. Applicant failed to  
19 prove the historic diverted flow rate and the historical consumed amount for the rights  
20 proposed for change. Applicant failed to prove the historic right to be changed. See Finding  
21 of Fact Nos.18, 21, 22,23, and 28 through 65.

- 22 6. The Applicant has not proven by a preponderance of evidence that the use of existing water  
23 rights of other persons or other perfected or planned uses or developments for which a  
24 permit or certificate has been issued or for which a state water reservation has been issued  
25 will not be adversely affected. Because Applicant has not identified the historic diverted flow  
26 and consumptive use for the water rights proposed for change, Applicant has not proven  
27 that the historic use will not be expanded by the proposed change. Without this information,  
28 the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-  
29 402(a); E.g., *In the Matter of the Application of Beneficial Water Use Permit Number 41H*  
30 *30003523 and the application for change number 41H 30000806 by Montana Golf*  
31 *Enterprises, LLC* (November 19, 2003) (Proposal for Decision denied change for lack of  
32 evidence of historical use; application subsequently withdrawn); *In the Matter of Application*  
33 *to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision,

1 adopted by DNRC Final Order (2005). Application for Water Rights in Rio Grande County  
2 (2002) \_\_Colo. \_\_, 53 P.3d 1165. See Finding of Fact Nos. 28 through 65.

- 3 7. The Applicant has proven by a preponderance of evidence that the proposed means of  
4 diversion, construction, and operation of the appropriation works are adequate. Mont. Code  
5 Ann. § 85-2-402(2)(b). See Finding of Fact No. 66.
- 6 8. The Applicant has not proven by a preponderance of evidence that the quantity of water  
7 proposed to be used is necessary for the proposed beneficial use. Mont. Code Ann. § 85-2-  
8 402(2)(c). E.g., In The Matter Of Application for Beneficial Water Use Permit 76lj-30008762  
9 by Vinnie J & Susan N Nardi (2006). See Finding of Fact Nos. 67 and 68.
- 10 9. The Applicant has proven by a preponderance of evidence that the Applicant has a  
11 possessory interest in the property where water is to be put to beneficial use. Mont. Code  
12 Ann. § 85-2-402(2)(d). See Finding of Fact No.69.
- 13 10. The Application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e). See  
14 Finding of Fact No. 70.
- 15 11. The Applicant has proven by a preponderance of evidence that the water quality of a prior  
16 appropriator will not be adversely affected. See Finding of Fact Nos. 71through74.
- 17 12. No objection was raised as to the ability of a discharge permit holder to satisfy effluent  
18 limitation of a permit. Mont. Code Ann. § 85-2-402(2)(f), (g). See Finding of Fact No. 71.
- 19 13. The Department may not grant an Authorization to Change a Water Right unless the  
20 Applicant proves all of the criteria in Mont. Code Ann. § 85-2-402 by a preponderance of the  
21 evidence. Applicant has not proven that all of the applicable criteria have been met. See  
22 Conclusion of Law No. 2. Mont. Code Ann. § 85-2-402(2).
- 23 14. The Department shall approve a change in appropriation right if the appropriator proves by a  
24 preponderance of evidence the criteria are met. Applicant has not proven all the criteria are  
25 met. Mont. Code Ann. § 85-2-402(2). See Conclusion of Law No. 2.

26 **THEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the  
27 Hearing Examiner makes the following:

28 **PROPOSED ORDER**

29 Application to Change A Water Right No. 41S 30013940 by T Lazy T Ranch Inc is **DENIED**.  
30

1 **NOTICE**

2 This Proposal for Decision may be adopted as the Department's final decision unless timely  
3 exceptions are filed as described below. Any party adversely affected by this Proposal for Decision  
4 may file exceptions and a supporting brief with the Hearing Examiner and request oral argument.

5 Exceptions and briefs, and requests for oral argument must be filed with the Department by  
6 **June 26, 2008**, or postmarked by the same date, and copies mailed by that same date to all  
7 parties.

8 Parties may file responses and response briefs to any exception filed by another party. The  
9 responses and response briefs must be filed with the Department by **July 11, 2008**, or postmarked  
10 by the same date, and copies must be mailed by that same date to all parties. No new evidence will  
11 be considered.

12 No final decision shall be made until after the expiration of the above time periods, and due  
13 consideration of *timely* oral argument requests, exceptions, responses, and briefs.

14 Dated this 6<sup>th</sup> day of June 2008.

15 /Original signed by Bill Schultz by e-signature/

16 Bill Schultz  
17 Hearing Examiner  
18 Water Resources Division  
19 Department of Natural Resources and Conservation  
20 PO Box 5004  
21 Missoula, Montana 59806-5004

### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the **PROPOSAL FOR DECISION** was served upon all parties listed below on this 6<sup>th</sup> day of June 2008 by First-Class United States mail.

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